STATE OF MICHIGAN

COURT OF APPEALS

ANDRE MAURICE LEWIS and KENYA DANEEN LEWIS, Co-Personal Representatives of the Estate of AARON LOVELL FAULKNER, Deceased,

Plaintiffs-Appellants,

v

TRENTON MICHAEL BURNS,

Defendants,

and

PONTIAC SCHOOL DISTRICT, BRENDA A. CAUSEY-MITCHELL, JAMES JOHNSON, HAYES JONES, WILLIE REDMOND, RICHARD T. SEAY, EIRTHER SHELMONSON-BEY, and PRESTON THOMAS, Trustees of the Pontiac School Board, and DR. SAM F. ABRAM, JONATHAN BROWN, K. JOSEPH YOUNG, ARTHUR J. MITCHELL, CITY OF PONTIAC, AJAX PAVING INDUSTRIES, INC., RICHARD L. LORENZ and MARY J. LORENZ,

Defendants-Appellees.

UNPUBLISHED
October 19, 2001

No. 220945
Oakland Circuit Court
LC No. 98-005237-NI

Before: Sawyer, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right, challenging the trial court's orders granting defendants' motions for summary disposition in this negligence case. We affirm.

Plaintiffs' decedent, an eleven-year-old Pontiac Madison Junior High School student, was brought to school by a school bus. Shortly after arriving at the school, decedent left the school premises and went across North Perry Street to a gas station/convenience store owned by defendants Lorenz. As decedent attempted to cross North Perry Street to return to school, he was fatally struck by a speeding van driven by defendant Burns. Following the incident, plaintiffs

brought suit against numerous defendants, alleging that their actions or inactions contributed to their son's death. The majority of plaintiffs' claims were dismissed by summary disposition.

I

Plaintiffs first argue that defendant Ajax Paving, who contracted with the Michigan Department of Transportation (MDOT) to perform certain resurfacing work on North Perry Street, was not entitled to summary disposition because it failed to maintain proper street lighting and failed to take measures to reduce the speed limit, among other things. We disagree.

We review de novo a trial court's decision to grant a motion for summary disposition. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 324; 583 NW2d 725 (1998). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. All factual allegations supporting the claim, and any reasonable inferences that can be drawn from the facts, are accepted as true. The motion is properly granted when the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions or any other documentary evidence submitted in a light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Rollert v Dep't of Civil Service*, 228 Mich App 534, 536; 579 NW2d 118 (1998). A motion is proper if no genuine issue of material fact exists, thereby entitling the moving party to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

In order to establish a negligence cause of action, a plaintiff must show "that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated the legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered." *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). Whether a defendant owes a duty to a plaintiff to avoid negligent conduct in a particular circumstance is a question of law for the court to determine. *Schmidt v Youngs*, 215 Mich App 222, 224; 544 NW2d 743 (1996). To determine whether the defendant owed the plaintiff a duty, courts examine a number of factors, including the relationship of the parties and the foreseeability and nature of the risk. *Schultz*, *supra* at 450.

Here, the trial court properly concluded that defendant Ajax did not owe plaintiffs' decedent a duty. At the outset, we note that the accident in this case occurred on North Perry Street, which is a state trunk line. The MDOT has exclusive jurisdiction over all state trunk line highways, and is responsible for constructing, improving and maintaining such highways. See MCL 250.61; *Alpert v Ann Arbor*, 172 Mich App 223, 227; 431 NW2d 467 (1988). Further, the evidence showed that, at the time of the accident, defendant Ajax had completed its construction work for the season, that their stopping point was several hundred yards north of where the accident occurred, and that the road was unobstructed and clear of any construction activity.

Further, based on the proffered evidence, defendant Ajax owed no duty to plaintiffs with regard to the inoperable streetlights on North Perry Street. Rather, according to Ajax' Project Engineer Manager, Ajax was not contracted to dismantle or remove any streetlights or streetlight

poles. Defendant Arthur Mitchell, the City of Pontiac's Deputy Engineer for the Department of Public Works and Services, testified that the city placed streetlights along North Perry, and that defendant Ajax was not responsible to turn on any streetlights after its construction. Mitchell also testified that the City of Pontiac was to follow the construction, making repairs or upgrading the streetlights as it became necessary. Likewise, the MDOT resident engineer responsible for the North Perry construction project testified that the City of Pontiac, as opposed to defendant Ajax, was "fully responsible" for maintaining the lighting on North Perry Street, and that it was not a part of the Ajax contract. There is simply no evidence that defendant Ajax had a duty to insure uninterrupted illumination of streetlights along North Perry Street.

Likewise, defendant Ajax had no duty to reduce the forty-five mile per hour speed limit on North Perry Street during its construction. Again, North Perry Street is a state trunk line under the jurisdiction of the MDOT. Moreover, the speed limit is set within the statutorily established speed restriction for traffic entering a "designated work area" of highway construction. See MCL 257.627(9).

We reject plaintiffs' claims that defendant Ajax was not entitled to summary disposition because it removed certain signage and retained control of any negligently performed subcontracting work, among other things. As the trial court found, plaintiffs failed to sufficiently plead factual allegations to support these claims in their first amended complaint. Plaintiffs may not add new allegations on appeal that were not properly pleaded below. See *Trail Clinic, PC v Bloch*, 114 Mich App 700, 713; 319 NW2d 638 (1982). Because plaintiffs cannot establish a prima facie case of negligence, the trial court properly dismissed plaintiffs' claims against defendant Ajax.

II

Plaintiffs also argue that the trial court erred in granting the city defendants summary disposition. Again, we disagree.

In reviewing a motion under MCR 2.116(C)(7), we review the pleadings and any documentary evidence submitted in a light most favorable to the nonmoving party to determine whether the moving party has established that it is entitled to governmental immunity. *Citizens Insurance Co v Bloomfield Twp*, 209 Mich App 484, 486; 532 NW2d 183 (1994). Further, the determination of the applicability of the highway exception is a question of law subject to de novo consideration on appeal. *Meek v Dep't of Transportation*, 240 Mich App 105, 110; 610 NW2d 250 (2000).

A. City of Pontiac

It is undisputed that defendant City of Pontiac is a governmental entity, and was involved in a governmental function. MCL 691.1407(1) provides:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

Plaintiffs rely on the highway exception, MCL 691.1402(1), which provides, in relevant part:

> (1) Except as otherwise provided in section 2a, each governmental agency *having jurisdiction over a highway* shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a *highway under its jurisdiction* in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency . . . . The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel . . . .
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> (2) If the state transportation department contracts with another governmental agency to perform work on a state trunk line highway, an action brought under this section for tort liability arising out of the performance of that work *shall be brought only against the state transportation department* under the same circumstances and to the same extent as if the work had been performed by employees of the state transportation department . . . .
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> (3) The contractual undertaking of a governmental agency to maintain a state trunk line highway confers contractual rights only on the state transportation department and *does not confer third party beneficiary or other contractual rights in any other person to recover damages to person or property from that governmental agency*. This subsection does not relieve the state transportation department of liability it may have, under this section, regarding that highway. [Emphasis added.]

The governmental immunity act plainly limits liability to the governmental agency *having jurisdiction over the highway* at the time of the injury; jurisdiction is determined by the existence of control over the highway. *Markillie v Livingston Co Bd of Rd Commrs*, 210 Mich App 16, 21-22; 532 NW2d 878 (1995); *Berry v City of Belleville*, 178 Mich App 541, 547; 444 NW2d 222 (1989). It is undisputed that decedent was fatally hit on North Perry Street, which is a state trunk line, and that the MDOT has exclusive jurisdiction over all state trunk lines. See MCL 250.61; *Alpert*, *supra*. Because defendant city lacks jurisdiction over North Perry Street, the highway exception to governmental immunity does not apply. *Id*. Moreover, because the MDOT has exclusive jurisdiction over the state trunk line, it cannot by contract shift liability to another governmental agency, including the City of Pontiac. MCL 691.1402(2) and (3), *Alpert*, *supra*. Accordingly, the trial court properly found that plaintiffs' claims against defendant city do not fall within the highway exception to governmental immunity.[1]

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[1] We note that plaintiffs' claim that the highway exception applies to this case because of "specific defects" is unpersuasive.

B. City Employees

It is undisputed that defendants Young and Perry are employees of the City of Pontiac. MCL 691.1407(2) provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment or service or volunteer while acting on behalf of a governmental agency if all of the following are met:
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> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
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> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
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> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "*gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results*. [Emphasis added.]

Plaintiffs claim that Young and Mitchell's negligent performance of their duties in connection with the inoperable street lighting, the lack of sidewalks, "and other factors" amounted to gross negligence. Summary disposition is precluded where reasonable jurors honestly could have reached different conclusions with respect to whether a defendant's conduct amounted to gross negligence. *Harris v Univ of Michigan Bd of Regents*, 219 Mich App 679, 694; 558 NW2d 225 (1996). However, where, on the basis of the evidence presented, reasonable jurors could not differ with respect to whether a defendant was grossly negligent, summary disposition should be granted. *Id*.

Here, many of plaintiffs' claims concern the condition of North Perry Street. As discussed with respect to defendant city, the MDOT had exclusive jurisdiction of the state trunk line and, thus, the city could not be held liable for the alleged defects. Moreover, even if the failure to maintain operable lights on North Perry Street was sufficient to constitute ordinary negligence, it is well established that evidence of ordinary negligence does not create a material question of fact concerning gross negligence. See *Harris*, *supra*; *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992). In sum, after a careful review of the record, we hold that reasonable minds could not conclude from the evidence presented that the acts or omissions of defendants Young and Mitchell constituted "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Accordingly, the trial court did not err in granting summary disposition with respect to plaintiffs' claims against defendants Young and Mitchell.

C. Timing of the Summary Disposition Motion

We reject plaintiffs' claim that the trial court's grant of summary disposition in favor of the city defendants was premature. Plaintiffs have failed to show that further discovery would have changed the undisputed basic facts indicating that the city defendants were entitled to governmental immunity. Because there was no possibility that discovery would result in a factual dispute relevant to the MDOT's exclusive jurisdiction over North Perry Street, the trial court's grant of summary disposition was appropriate. *Gara v Woodbridge Tavern*, 224 Mich App 63, 68-69; 568 NW2d 138 (1997).

III

Next, plaintiffs claim that the trial court erred in granting summary disposition to the Pontiac School District, the school board members, the superintendent, and the principal of decedent's school, because their son was dropped off at school before the doors were opened, where he was left outside in the dark and unsupervised, among other things.

A. Defendant School District

As previously discussed, under the governmental tort liability act, MCL 691.1401 *et seq*., governmental agencies are immune from tort liability when engaged in a governmental function. Immunity from tort liability is broadly applied to all governmental agencies for all tort liability whenever they are engaged in the exercise or discharge of a governmental function, unless one of the narrowly drawn exceptions applies. See *Chaney v Dep't of Transportation*, 447 Mich 145, 154; 523 NW2d 762 (1994); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 595 618; 363 NW2d 641 (1984). Here, plaintiffs have not demonstrated that any of the recognized exceptions to governmental immunity apply.

In any event, defendant Pontiac School District is an agency of the state government. See *Nalepa v Plymouth-Canton Community Schools*, 207 Mich App 580, 587; 525 NW2d 897 (1994). Further, defendant school district was engaged in the exercise of a government function with regard to the operation of Madison Junior High School, including the transportation of decedent to the school. See MCL 691.1401(f), and MCL 380.1 *et seq.*; see also *Cobb v Fox*, 113 Mich App 249, 257; 317 NW2d 583 (1982). Plaintiffs have failed to provide any authority for their proposition that, at the time of the accident, defendant school district was not within the purview of operating a school, i.e., performing a governmental function. A party may not merely announce a position and then leave it to this Court to discover and rationalize the basis for the claim. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

We also note that plaintiffs' claim that decedent was locked out of the school is not supported by the record. To support this claim, plaintiffs relied below on the statement of a student, who stated that when he ran to the school to obtain help after decedent was injured, the first door that he tried was locked. The student, however, stated that the main door of the school was unlocked. Further, the principal of the school averred in an affidavit that, on the day of the accident, the doors of Madison Junior High School were opened at 6:30 a.m., as they are every day. In sum, we conclude that the trial court properly dismissed plaintiffs' claims against defendant school district.

B. Defendants School Board Members and Superintendent

Plaintiffs maintain that the school board members and the superintendent are not entitled to summary disposition because governmental immunity does not extend to "the day-to-day operations of a school, which is not the exercise of broad policy making powers."

MCL 691.1407(5) provides in pertinent part:

> Judges, legislators, and *the elective or highest appointive executive officials* of all levels of government are immune from tort liability for injuries to persons or damages to property whenever they are acting within the scope of their judicial, legislative, or executive authority. [Emphasis added.]

This Court has previously held that the school board members are the elective executive officials of their level of government (the school district), and that the superintendent is the highest appointive executive official of the school district. *Nalepa, supra* at 587-589. Further, as discussed above, the school board members and superintendent were acting within the scope of their authority with regard to the operation of Madison Junior High School. MCL 380.1 *et seq.* Accordingly, the school board members and superintendent are absolutely immune from tort liability under MCL 691.1407(5).

C. Defendant Principal Brown

We also reject plaintiffs' claim that the principal of the school, defendant Brown, was not entitled to governmental immunity because reasonable jurors could differ as to whether his conduct amounted to gross negligence.[2] MCL 691.1407(2)(c); *Harris, supra*.

As previously indicated, the evidence did not bear out plaintiffs' claims that the school doors were locked on the morning of the incident. In addition, in an affidavit, defendant Brown stated that he personally had no duty to supervise any of the students on the school grounds during the time of the accident, but had other administrative duties entrusted to him. Further, before the instant incident, defendant Brown had no knowledge of any student ever being injured by a vehicle while attempting to cross North Perry Street near the school. After a careful review of the record, we hold that reasonable minds could not conclude from the evidence presented that defendant Brown's acts constituted "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Accordingly, the trial court did not err in granting summary disposition with respect to plaintiffs' claims against defendant Brown.

IV

Plaintiffs' final claim is that the trial court erred in granting defendants Lorenz summary disposition because a question of fact existed with regard to whether their act of selling "good

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[2] As the principal of a school, defendant Brown does not qualify for the immunity granted to highly ranked officials. See *Eichhorn v Lamphere School Dist,* 166 Mich App 527, 539; 421 NW2d 230 (1988).

candy" near the school, causing the schoolchildren to cross North Perry Street, constituted an attractive nuisance. Again, we disagree.

With regard to the "attractive nuisance" theory, Michigan has expressly adopted 2 Restatement Torts, 2d, § 339, which addresses artificial conditions highly dangerous to trespassing children. The law of attractive nuisance "places an affirmative duty on landowners to carry on activities involving a risk of death or serious bodily harm with reasonable care for the safety of known trespassing children." *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 182; 475 NW2d 854 (1991) (citation omitted).

At the outset, we note that plaintiffs have not provided any authority for their suggestion that the mere operation of a business that sells "good candy" and other snacks near a school constitutes an attractive nuisance. *Goolsby*, *supra*. In any event, the availability on defendants' premises of "good candy" and other snacks in and of itself is not dangerous, and there is simply no evidence that the accident in this case occurred because of defendants' act of selling snacks on their premises. Indeed, to find in this case that the selling of "good candy" constitutes an unreasonable risk of death or serious bodily harm would be unreasonable and would stretch the attractive nuisance doctrine to questionable limits. Moreover, the accident in this case did not occur on defendants' premises, but on a state trunk line, which is under the exclusive jurisdiction of the MDOT. Accordingly, plaintiffs have failed to demonstrate that defendants were carrying on any activities from which decedent should have been protected, and, thus, plaintiffs cannot establish a prima facie case of negligence based on the attractive nuisance theory.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Talbot
/s/ Donald S. Owens